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Douglas E. Abrams

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FAIRNESS IN CIVIL RIGHTS

ARBITRATION

Douglas E. Abrams

In 1987, 62-year-old Robert Gilmer was fired by Interstate/Johnson Lane Corporation, after six years as the company’s financial services manager. Out of a job, he tried to sue Interstate in federal court. He alleged that the company had violated the Age Discrimination in Employment Act, which protects older workers from discrimination in hiring, firing, or granting benefits. In 1991, the Supreme Court held that Gilmer could not sue in court because when he was hired, he had signed an agreement to arbitrate future disputes that might arise between him and the company. An arbitrator would now hear evidence from both parties and render a decision binding on them.

Arbitration’s shortcomings, well articulated by Professor Carbonneau, are particularly disturbing when plaintiffs allege violation of a civil-rights statute like the age-discrimination act. Before the Gilmer decision, the Supreme Court had never expressly upheld civil rights arbitration under the U.S. Arbitration Act. Because Gilmer indicated that the Court would now uphold arbitration of claims under any civil-rights statute, large corporate employers routinely require advance written agreements to arbitrate claims arising from the employment relationship. A prospective employee who refuses to sign is likely not to get the job at all. Arbitration clauses enable employers to avoid court resolution of claims under not only the age-discrimination act, but also federal and state statutes prohibiting discrimination based on race, national origin, creed, gender, or disability.

Civil-rights statutes are simply too important to be entrusted to arbitration. As Professor Owen Fiss of Yale has written, judges hold office under public authority, conduct trials open to the public, and explain their decisions on the public record; arbitrators serve as private decision makers, conduct proceedings closed to the public, and normally communicate their decisions only to the parties. An employer thus could hide persistent civil-rights violations from public scrutiny by compelling all its employees to sign agreements to arbitrate future claims. Arbitration agreements also enable employers to keep civil-rights plaintiffs away from juries, which normally may award punitive damages for intentional discrimination while arbitrators normally do not. Not only that, but courts rarely overturn arbitration decisions, even where the arbitrator applied the law incorrectly or made clear mistakes in fact-finding.

From my own experience serving on three-member arbitration panels, I believe most arbitrators strive to conduct evenhanded proceedings and to apply the law correctly. As a general matter, I even believe in arbitration’s essential fairness
when parties voluntarily agree to arbitrate. These beliefs, however, are not the point. The point is that civil-rights claims are fundamentally different from other claims. Civil-rights statutes are public mandates to redress historic discrimination against particular classes or groups of persons. If we are to remain true to our ideals of equal justice under law, the final word in civil-rights cases must rest with publicly accountable courts rather than privately empowered arbitrators.

A FEW BASICS ABOUT ARBITRATION

Our system has two intimately related types of arbitration. “Labor arbitration,” grounded in major federal labor statutes, is the narrower of the two because it occurs only when the dispute arises from a collective-bargaining agreement. Because Robert Gilmer and Interstate were not parties to a collective-bargaining agreement, they engaged in the second type, “commercial arbitration,” which is grounded in the U.S. Arbitration Act. Despite their differences, the two types of arbitration share many similarities. Later in this article, we will see that in the civil-rights sphere, labor arbitration holds important lessons for its commercial counterpart.

A party must arbitrate, and thus forgo court resolution, only if (like Gilmer) the party has agreed to arbitrate. Parties may sign an arbitration agreement either before or after a dispute arises. Agreements signed after the dispute arises—so-called postdispute agreements—cause little controversy, even in civil-rights cases. Our legal system permits parties to settle their claims, including claims under civil-rights acts. Indeed, more than 90 percent of civil lawsuits in the federal and state courts end in settlement rather than in a court decision. Given this scorecard, the parties’ postdispute arbitration agreement is akin to an agreement to have their existing dispute settled by a third party, the arbitrator.

More troublesome are “predispute” arbitration agreements, which parties may sign long before any dispute actually arises. Robert Gilmer signed this sort of agreement when Interstate hired him, six years before he was fired. The problem with predispute agreements is that the party holding superior bargaining power (for example, the prospective employer) frequently imposes them, often in a standard form contract presented on a “take it or leave it” basis. The party in the weaker position (for example, the prospective employee) may not pay particular attention to the arbitration clause amid all the contract’s other provisions. If the weaker party does pay attention, he may not fully understand that by agreeing to arbitration, he forfeits the right to a day in court on civil-rights claims years later. Even if he does understand, he is likely to sense that he would lose the job opportunity altogether if he balks at the arbitration clause.

PRODUCING FAIR CIVIL-RIGHTS ARBITRATION

Because predispute arbitration agreements so often result from one-sided negotiation, we should not allow them to shut the courthouse door to private civil-rights enforcement. Labor arbitration holds an important lesson here. Where an employee loses on a statutory discrimination claim in labor arbitration, the employee may
bring a court suit afterward to try to establish that claim. The arbitration hearing is not necessarily wasted effort, because it may resolve the dispute once and for all. Where the employee does go to court after the arbitration, the court may give the arbitrator's decision appropriate weight. If the judge determines that the arbitrator fully and fairly heard the evidence and considered the employee's rights, the court may decide the discrimination claim the same way the arbitrator did. But the judge may also correct any errors the arbitrator made and may decide that the arbitrator's decision was wrong. In labor arbitration, then, the final word in applying civil-rights law rests with the courts, where it belongs.

The potential for unfairness in commercial arbitration of civil-rights claims is largely the fault of Congress. The lawmakers missed a golden opportunity when they enacted the Americans with Disabilities Act of 1990. The Civil Rights Act of 1991 made matters even worse. Congress each time backed down from enacting safeguards that many lawmakers clearly knew are conducive to fairness when predispute agreements produce arbitration of civil-rights claims. These lawmakers publicly stated that civil-rights claimants in commercial arbitration, like their counterparts in labor arbitration, should have the right to a later trial in which the court would give appropriate weight to the arbitrator's decision. But these statements were made only in House and Senate floor debates and in published House Judiciary Committee reports preceding passage of the 1990 and 1991 acts. Statements made in floor debates and reports do not have the force of law. When all the dust had settled, Congress lacked the fortitude to place the safeguards in the acts themselves.

Congress should now finish the work it began six years ago. Employees should hold the right to seek judicial redress if they lose a statutory civil-rights claim in commercial arbitration, with courts instructed to give appropriate weight to the arbitrator's decision. Employers, who do not hold the right to sue if they lose on civil-rights claims in labor arbitration, should not hold the right to sue after losing in commercial arbitration either. Employment discrimination statutes protect employees, not employers. The employee will normally be the weaker party to the predispute arbitration agreement, frequently unable to meet the burdens and expense of litigation. If the employer could sue after losing in arbitration, the employer could frequently undo the employee's arbitral victory, not because the law is on the employer's side, but because the employee could not afford to defend the lawsuit. Because it is the employer who ordinarily insists on the predispute arbitration agreement in the first instance, the employer may fairly be bound by the arbitrator's decision.

As a society, we demonstrate our dedication to the rule of law when we insist on fair processes for resolving the disputes that inevitably arise in our everyday life. We should remain particularly vigilant when rights guaranteed by our nation's civil-rights laws are at stake. When disputes require binding resolution by a neutral decision maker, publicly constituted courts rather than private arbitrators should be the ultimate guardians of these precious rights. ■

Douglas E. Abrams is a professor at the University of Missouri Law School in Columbia. His articles have been quoted in decisions of the Supreme Court and other federal courts. Last year he wrote about civil-rights arbitration in the Connecticut Law Review.